In the Supreme Court of the United States.

OCTOBER TERM, 1964

No. 257

NELLIE LOUISE CARSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25; R. 197) is reported at 329 F. 2d 319. Its opinion on the petition for rehearing (Pet. App. 23–24; R. 205–206) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1964 (Pet. App. 20; R. 198). A petition for rehearing was denied on June 5, 1964 (Pet. App. 21; R. 201–207), and the petition for a writ of certiorari was filed on July 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

740-264—64

QUESTIONS PRESENTED

1. Whether petitioner consented to the search of her house.

2. Whether the conviction should be reversed because photographs shown to witnesses who identified petitioner had been taken during an alleged period of unlawful detention.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Georgia and given consecutive one-year sentences on each of three counts charging the passing of three different counterfeit $20 bills, in violation of 18 U.S.C. 472 (R. 39–41; 180–181). The conviction was affirmed on appeal (Pet. App. 20; R. 198).

On the evening of December 18, 1962, a woman made purchases at the Vogue Shop and two other stores in a shopping center at Brunswick, Georgia, passing three counterfeit $20 bills (R. 75–76, 88–89, 97–98, 105–106). A few days later a Secret Service agent, Killian, talked to the sales girls, each of whom gave a description of the woman (R. 47–49, 82, 94, 101-102, 113).

On the evening of January 12, 1963, Killian and several local officers, armed with a federal search warrant, arrested one Pritchard, petitioner's friend, at the Amvets Club in Griffin, Georgia (R. 49, 59, 66, 67, 68). At this time Killian saw petitioner who "fit to a T" the description of the woman who had passed the counterfeit bills in Brunswick (R. 61, 69). Later petitioner, while in jail on a local charge of disorderly

conduct (R. 55), asked the sheriff for permission to talk to a federal agent. Killian spoke with her (R. 58, 68). When petitioner asked why she was being held, Killian answered that he did not know since that was up to the sheriff. Petitioner said that Prifchard had given her some $20 bills, but that if they were counterfeit she did not know it. No mention of counterfeiting had been made up to that point.

On the basis of this information, Killian then asked if petitioner would mind if the agents searched her home and she replied, "No, go right ahead" (R. 58, 60, 62). Killian testified that he had just reached petitioner's home and had been admitted by her roommate when the sheriff arrived with the petitioner from the jail. Petitioner again consented to the search and showed him where her bedroom and clothes closet were located (R. 50, 55–56).[1] In the search, agent Killian seized five counterfeit $20 bills and a sweater which had been purchased at the Vogue Shop in Brunswick (R. 62, 63). After the counterfeit bills were discovered, petitioner was arrested by the federal agents and taken to the Fulton County Jail (R. 50–51, 72–73).

On the following morning (January 13, 1963) petitioner was taken to the office of the Secret Service agents in Atlanta where seven or eight photographs were taken (R. 51–52). Petitioner testified that she

[1] Petitioner's roommate testified that the officers had been searching the house about 15 or 20 minutes before petitioner's arrival (R. 148–149). Petitioner testified that the officers were already searching her house as she walked in, and that when they said they did not have a search warrant, she ordered them to get out (R. 163–164).

asked the agents not to take her picture (R. 164–165). On that same date at 2:45 p.m., a preliminary hearing was held before a United States Commissioner at Gainesville, Georgia, on the charge that petitioner had illegally possessed two or more counterfeit $20 bills. At the conclusion of the hearing, at which petitioner was represented by an attorney of her choice, the Commissioner ordered petitioner held for a grand jury investigation (R. 9–25, 53).

Subsequent to January 13, 1963, and prior to February 12, 1963 (the date on which the indictment was returned (R. 25)), agent Killian again spoke to the sales girls and showed them photographs of petitioner. He also showed the Vogue sales girls the sweater which petitioner had purchased, and they identified it as coming from their shop (R. 92–93, 95–96, 103).

Petitioner unsuccessfully moved for suppression of all evidence seized at her home and for suppression of the testimony of any witness who had been shown photographs of petitioner taken against her will (R. 2–9). None of the evidence seized in the search of petitioner's home was introduced at the trial (R. 73, 168). The sales girls identified petitioner as the woman who had passed the counterfeit bills by pointing her out in the jury's presence (R. 75, 88–89, 98, 105, 116).

ARGUMENT

1. The evidence was sufficient to show that petitioner consented to the search of her house. Valid consent to a search may be given by an accused who is in custody. *United States* v. *Mitchell*, 322 U. S. 65. In this case petitioner, while in State custody, asked

to see a federal agent. In her conversation with agent Killian at the jail, before any reference had been made to counterfeiting, she volunteered the statement that if some $20 bills Pritchard had given her were counterfeit, she did not know this. Consent to a search would be a normal part of a strategem to show her innocence.

The sweater which petitioner had purchased at the Vogue Shop with a counterfeit bill was validly seized as contraband. There was thus no impropriety in merely showing this sweater to two Vogue sales girls[2] so that they could identify it as having come from their shop, in corroboration of their previous eye-witness description of petitioner as the culprit. The sweater was not introduced in evidence at the trial.

2. There is no substance to petitioner's contention that photographs taken without her consent during a period of alleged illegal detention in violation of Rule 5(a), F.R. Crim. P., became "fruit of the poisonous tree" under *Nardone* v. *United States*, 308 U.S. 338, 341, making it improper to show them to prosecuting witnesses for the purpose of identification.

Rule 5(a) was not violated. On January 12, 1963, around midnight, petitioner was arrested on the federal charge and taken from Griffin to the Fulton County Jail in Atlanta. The photographs were taken the following morning. Petitioner was taken before the nearest available commissioner at Gainesville that

[2] Petitioner misstates the evidence in asserting that the sweater was shown to all of the clerks involved at the Brunswick shopping center (Pet. 3-4, 16). The sweater was shown only to the two Vogue sales girls (R. 92-93, 95-96, 103).

afternoon. Petitioner was arrested in an area where commissioners are not instantly available at all hours. The short interval between the arrest and arraignment did not constitute unnecessary delay under Rule 5(a) (see *Mallory* v. *United States*, 354 U.S. 449, 454, 455).

Moreover, in this case the use of the photographs would not require reversal of the conviction even if taken during a period of illegal detention. The sales girls had given the agent a detailed description of the petitioner within a few days after her purchases, and therefore could have identified her without being shown her photograph. The agent merely showed the photographs of petitioner to the sales girls for confirmation of petitioner's identity. The photographs were not used in evidence and the sales girls identified petitioner at the trial by pointing to her in the court room.[2] In these circumstances, the relationship of the photographs to the evidence introduced at the trial was too attenuated to taint it as "fruit of the poisoned tree." Cf. *Smith* v. *United States*, 324 F. 2d 879 (C.A.D.C.), certiorari denied, 377 U.S. 954; *Payne* v. *United States*, 294 F. 2d 723 (C.A.D.C.), certiorari denied, 368 U.S. 883.

[2] One sales girl testified that, even had she not been shown a photograph of the petitioner, there would be no doubt in her mind that petitioner was the person who had passed the counterfeit bill (R. 116).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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